87-88

Case No. _____

UNITED STATES SUPREME COURT

October Term, 1986

PATRICIA MABRY,

Petitioner,

v.

STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. May discrimination based on head of household status be forbidden by administrative regulation issued under the auspices of the prohibition on sex discrimination contained in Title IX of the Education Amendments of 1972?

2. Did petitioner work in a "educational program or activity" receiving federal funds within the meaning of Title IX?[1]

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[1] In addition to the parties listed in the caption, Gordon Dickinson, Ross Forney, Angelo Daurio, Dr. Elinor Greenberg, Thomas Grimshaw, Raymond Guerrie, Isaiah Kelley, Jr., Fred Valdez, Sr., Raymond Wilder, and Thomas Sullivan were named defendants.

Table of Contents

Table of Authorities

Miscellaneous:

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Patricia Mabry petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Decisions Below

The Tenth Circuit's opinion is reported at 813 F.2d 311, 43 Fair Empl. Prac. Cas. (BNA) 259 and 42 Empl. Prac.

Dec. (CCH) ¶36,864 and is reproduced at Appendix (App), pp. 2-29. The district court's decision following trial is not reported, but is reproduced at App. 32-42. The district court's decision on summary judgment is reported at 597 F. Supp. 1235, 36 Fair Empl. Prac. Cas. (BNA) 526 and 38 Empl. Prac. Dec. (CCH) ¶35,593 and is reproduced at App. 43-61.

Jurisdiction

The Tenth Circuit's judgment was entered March 8, 1987. Petitioner's timely request for rehearing was denied April 14, 1987. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutes and Regulations

20 U.S.C. § 1681(a):

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

education program or activity receiving Federal financial assistance ...

34 C.F.R. § 106.57 (1986):

(a) General. A recipient shall not apply any policy or take any employment action:

* * *

(2) Which is based on whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

Statement of the Case

Patricia Mabry was the most junior and only female member of the physical education faculty at Trinidad State Junior College ("College") in Trinidad, Colorado. App. 4. In addition to physical education Mabry taught speech and first aid. App. 4, 66-68. The speech and first aid courses taught by Mabry were required for degrees in criminal justice, nursing and soil

conservation. App. 4. The criminal justice, nursing and soil conservation programs of the College (among others) received direct federal funding. App. 67, 77-78. Students pursuing degrees in these programs were also required to obtain three hours of physical education credit. App. 67.

In 1980, the College administration determined to reduce the number physical education faculty. By state statute[2] individuals of "relatively equal" competency were to be reduced in reverse order of seniority. The College made no evaluation of the competency of physical education instructors and notifed Mabry that she would be terminated. Due to the lack of evaluation a state administrative

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2 § 23-10-203(4), 9 Colo. Rev. Stat. (1986 Cum. Supp.).

hearing officer and board reversed the College's action. App. 75-76.

In 1981, College President Thomas Sullivan performed a perfunctory evaluation of the physical education faculty, found them "relatively equal" and again sought to terminate Mabry. Mabry again challenged the termination, arguing primarily that her extensive graduate level studies and professional activities made her relatively more competent than her more senior male colleagues.

In defending his determination that all physical education faculty were "relatively equal," Sullivan testified that he had not considered Mabry's more extensive academic preparation and activities to make her more qualified in part because her male colleagues were

married and had children, while Mabry was single. E.g., App. 4-5, 69-75. Mabry exhausted the administrative procedures for termination of college faculty under state statute as well as the Equal Opportunity Employment Commission procedures for Title VII charges. This litigation followed.[3]

Mabry's complaint claimed violation of Title VII and Title IX[4] and she argued, first, that Sullivan's admission of explicit consideration of the marital and parental status of Mabry and the male faculty was evidence of intentional

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[3] The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 2000e-5f.

[4] Mabry plead that termination "on the basis of her parental or marital status ... violated 20 U.S.C. § 1681 and its implementing regulations." Complaint ¶ 17. She also claimed such violation gave rise to an action under 42 U.S.C. § 1983. Id at ¶ 18.

sex-based discrimination and, second, that disadvantaging a single woman because her male colleagues were married heads of households per se violated 34 C.F.R. § 106.57(a)(2) and, therefore, Title IX.

The district court granted partial summary judgment dismissing the Title IX claims, holding that Mabry did not work in a "education program or activity" receiving federal funds. App. 53-59. Following trial, the district court dismissed the Title VII "disparate treatment" claim, crediting Sullivan's statement that his evaluation of faculty competence was not tainted by intentional consideration of "sex." App. 32-42. The district court's decision following trial made no mention of Sullivan's admitted, and undisputed, consideration of marital

and parental status in determining faculty competencies. Final judgment entered on the court's ruling following trial, and Mabry appealed.

On appeal Mabry challenged the determination that she had not worked in a program or activity receiving federal funds and argued that a prima facie violation of 34 C.F.R. § 106.57(a)(2) had been shown. The defendants joined these issues and additionally argued that: (1) the availability of a Title VII remedy preempted the private cause of action under Title IX, and (2) the district court's adverse determination of the Title VII disparate treatment claim "estopped" any claim under Title IX.

The Tenth Circuit ruled that: (1) an administrative regulation forbidding discrimination based on marital or

parental status would be invalid as reaching beyond the Congressional prohibition on sex discrimination; (2) the prohibition on sex discrimination in Title IX was "no broader" than the prohibition in Title VII; and (3) Mabry's decision to argue only the Title IX issues on appeal constituted a "failure to appeal" the adverse Title VII ruling, which then operated by res judicata or collateral estoppel to preclude further consideration of the Title IX claim. App. 1-31.

Reasons for Granting a Writ

I. 34 C.F.R. § 106.57(a)(2) is Valid.

34 C.F.R. § 106.57(a)(2) squarely prohibits employment discrimination based on head of household status. The Tenth Circuit admitted that this subsection "would appear" to prohibit such

discrimination, but found such a prohibition "would extend beyond the prohibitions of Title IX." "The regulation at issue cannot, therefore, prohibit" discrimination based on head of household status.[5]

The language of 34 C.F.R. § 106.57(a)(2), has its origins in the original promulgation of implementing regulations under Title IX. 40 Fed. Reg. 2418 (June 4, 1975). It has carried over in the various recodifications of these regulations, issued by several federal agencies, to the present. E.g., 45 C.F.R. § 86.57(a)(2). The Tenth Circuit's rather casual invalidation of

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[5] The Tenth Circuit refers to the prohibition on head of household discrimination as an "interpretation" of 34 C.F.R. § 106.57(a)(2). But there is no "interpretation" involved; the rule says precisely what Mabry has claimed it said all along.

this long-standing regulation is erroneous, and presents an important issue in employment discrimination law.

The deference due to regulations implementing a statute is clear:

> If ... Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. ... Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> * * *
>
> ... [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron U.S.A. v. N.R.D.C., 467 U.S. 837, 843-844 (1984) (citations and footnotes omitted).

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." ... "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion ...'"

Udall v. Tallman, 380 U.S. 1, 16 (1965) (citations omitted). See also Lukhard v. Reed, ___ U.S. ___, 55 L.W. 4561, 4563 n. 3 (April 22, 1987).

Thus, the question here is whether prohibiting discrimination based on head of household status is a "reasonable" interpretation of the prohibition on

"sex" discrimination in Title IX. The Tenth Circuit got off on the wrong foot in answering this question in part because of its apparent determination that there not be "two separate substantive standards concerning sex discrimination in employment." App. 27. Yet the possibility that two standards will exist is inherent when one statute (Title VII) calls for interpretation "in the first instance in judicial proceedings," while another (Title IX) requires judicial deference to any reasonable administrative interpretation.

More importantly, the regulation is manifestly reasonable. One need not reach beyond the first decision of this Court concerning sex discrimination in employment to demonstrate that head of

household categorizations generally reflect sex-stereotyping:

> The [plaintiff] ... assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life.
>
> It certainly cannot be affirmed, as an historical fact, that this has ever been established ... On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. ... The constitution of the family organization ... indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. ...
>
> It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married

> state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.

Bradwell v. State, 83 U.S. (16 Wall.) 130, 140-141 (1872) (Opinion of Justice Bradley).

The implications of thinking like Justice Bradley's are easily worked out and obviously discriminate on the basis of "sex." Men are responsible as 'bread winners' for their families and therefore should be preferred for employment over women. Nevertheless, a single mother is suspect as an employee since her "paramount" interest will no doubt remain that of "mother." Unmarried women with no children, like petitioner, are mere "exceptions to the general rule."

That such reasoning was the very evil perceived by Congress as in need of

remedy seems beyond doubt. First, it is surely no coincidence that Title IX focuses on education. Congress perceived that women needed "solid legal protection as they seek education and training for later careers ..." 118 Cong. Rec. 5806-5807 (1972) (Remarks of Senator Bayh) (emphasis added). The stereotyping that suggests women are less fit for professional careers a fortiori suggests they do not need training for such careers. Further, the sterotyping of women as first and foremost homemakers was one of the express concerns leading to the passage of Title IX. The "genesis" of Title IX, of course, was in hearings conducted by Representative Edith Green of Oregon in 1970. See Cannon v. Univ. of Chicago, 441 U.S. 677, 694 n. 16 (1979). The committee chaired

by Representative Green received statistical studies showing that increasing numbers of both married women and women heads of households were entering the labor force, but that women heads of household, in particular, were still comparatively poor. E.g., Stimpson, ed., Discrimination Against Women (1973), pp. 343-45, 351-360 (excerpts from testimony before Representative Green's committee). Commentators before the committee complained that male educators discriminated against female professionals in part because they did not "distinguish between these women and their own homemaker wives." Id at 457. Citation to such studies and concerns as expressed to Congress could be multiplied, but the point seems too

obvious to need repetitious citation: A stultified view of the role of women in the home and as parents is a root cause of discrimination against women in the workplace. Surely it is rational for the an administrative agency, by rulemaking, to directly attack this cause of sex discrimination.

While a court will typically accept or reject the argument that head of household discrimination <u>is</u> sex discrimination on a case by case basis, an administrative agency is free make this determination, reasonably, "as a general rule." Just as legislation is typically based on generalities rather than painstaking individuation so, reasonably, may administrative rules move from a general correlation to an across-the-board prohibition. 34 C.F.R.

§ 106.57(a)(2) is just such a rule, and was improperly invalidated by the Tenth Circuit.

Because the Tenth Circuit erred in invalidating this regulation, the Title VII determination has no necessary effect on Mabry's Title IX claim.[6]

II. Mabry Taught in Programs Receiving Federal Funds

Generally, this Court reviews decisions of the federal Courts of

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[6] Mabry appealed a judgment, not isolated issues. Thus, the Tenth Circuit's use of the language of preclusion by judgment was misplaced; a judgment under appeal does not estop itself. However this error, while egregious, is irrelevant. We could have argued that the admission of head of household discrimination made the finding of no "sex" discrimination under Title VII or Title IX "clearly erroneous." E.g., Coble v. Hot Springs School Dist., 682 F.2d 721 (8th Cir. 1982). We did not. Here, as in the Tenth Circuit we are content to argue only that 34 C.F.R. § 106.57(a)(2) was applicable, valid and violated.

Appeals and the Tenth Circuit did not reach this issue. The facts involved here are simple enough, the law from this Court clear enough and the district court's error serious enough to justify review of this point, nonetheless.

The district court found that Mabry's primary assignment, in physical education, did not directly receive federal funds and, therefore, Title IX did not apply. This approach, while paying lip service to Grove City College v. Bell, 465 U.S. 555 (1984), ignores that Mabry's activities received some direct support from federal funding and her position, taken as a whole, as well as her department, received "indirect" support. See O'Connor v. Peru State College, 781 F.2d 632 (8th Cir. 1986) (criticizing Mabry and other decisions as

focusing on "the very smallest subunits" of an institution in a way that "retain[s] the direct/indirect distinction expressly rejected" in Grove City).

Courses taught by Ms. Mabry were required for students pursuing degree programs that received direct federal funding. Thus, the physical education department benefited from an instructor who was partially employed in directly federally-supported non-physical education programs. Further, the physical education program benefited from having its courses generally required for those pursuing federally supported degree programs. Ironically, the College determined which degree programs to offer, which courses would be required

and which Ms. Mabry would teach, not to mention which federal funds to apply for.

Put another way, a student who enrolls in federally assisted programs does so not just to take courses in the area federally funded, but to obtain an education and a degree. Similarly, Congress provides support not for specific courses, but for programs that provide an education in a given discipline. The recipient college then determines what courses are required for it to certify the proper level of general education and proficiency in a specific discipline. The college also determines which departments and faculty will deliver the required courses. Departments and faculty thus benefit from federal funding (directly or indirectly) based on the college's own determination

of degree requirements. Simply, the College here determined that federally funded programs required Ms. Mabry's services in teaching P.E. and other courses. Her position, plainly, was covered by Title IX.

It may well be most sensible to simply determine that the College's academic programs as a whole "received" federal funds. This Court's decision in Grove City seems to contemplate such a result when it finds the entire financial aid program of that college "received" federal funds. See O'Connor v. Peru State College, supra. But in any event, student enrollment in directly funded programs which in turn inure to the benefit of particular academic departments and academic faculty by virtue of degree requirements should

unquestionably bring those departments and faculty within the ambit of Title IX. Mabry was plainly covered by Title IX, and thus by 34 C.F.R. § 106.57(a)(2).

III. These Issues Are Important

We are well aware that error, alone, does not justify resort to this Court. The issues here are important, however, for several reasons. First, this Court's decision in Grove City is widely misperceived (as in this case by the district court) as dramatically restricting the scope of Title IX. An exclusive focus on the "program specificity" of Title IX and like statutes unduly restricts the reach of "indirect" federal funding. This, in turn, frustrates the underlying purpose of "avoid[ing] the use of federal resouces to support discriminatory

practices." Cannon v. Univ. of Chicago, supra, 441 U.S. at 704. The area of academic life in which Title IX has perhaps brought and still promises the greatest progress -- physical education and athletics -- is perhaps the area most vulnerable to the misconstruction illustrated by this case.

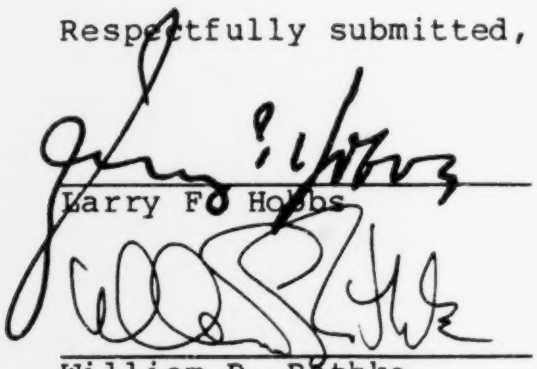
The relationship of head of household discrimination to sex discrimination is similarly important. The initial scope of Title IX, like Title VII, was broad and its remedial purposes expansive. The problem of discrimination against women heads of household, because they were heads of household, was an express concern before Congress. The sex stereotyping that treated male professionalism as natural and female professionalism as freakish was an evil

attacked by this statute. We do not suggest the courts are at fault in giving too parsimonious a reach to Title VII. We do suggest that a legitimate effort by an administrative agency to address the root causes of invidious discrimination has been here far too readily set aside.

Conclusion

For these reasons certiorari should be granted.

Respectfully submitted,



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